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In the Supreme Court

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United States.

OCTOBER TERM, 1904.

HENRY DALLEMAGNE, Consul General of the Republic of France,

Appellant,

v.

JEAN FRANCOIS MOISAN,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

For the purposes of this argument we agree that the statement of facts of appellant's opening brief is correct. That is to say, that the prisoner, Jean Francois Moisan, a sailor on the French bark Jacques, was arrested by the Chief of Police of the City and County of San Francisco, State of California, on a written request from the Consul General of the French Republic, the appellant, stating that Moisan "had conducted himself in an improper and insubordinate manner on board"; that the arrest took place on board the Jacques, and pursuant to the request Moisan was taken on shore to the city and county prison. That the "Jacques", some time after the arrest, left port and that Moisan was being held a prisoner by the said state officer until the Consul General of France could "find an opportunity of sending him away".

As a preliminary comment on the above facts we would call the Court's attention to the following:

(1) That the prisoner is not charged, nor held pending the preferment of charges, with any offense against the laws of the State of California;

(2) That the arresting official is not a federal officer, that it does not appear that he is a citizen of the United States, but that he makes the arrest *qua* an officer of a city and county of the State of California;

(3) That the prisoner is not charged with deserting the ship, thus bringing him within the apparent exception of Robinson v. Baldwin, 165 U. S. 275, holding that the sailor is attached to his ship in a quasi chattel relationship, enforcible by a quasi civil contractual proceeding;

(4) That the prisoner is not alleged not to have been a citizen of the United States.

The act of the city and county chief of police is justified under Article VIII of the consular treaty between the United States and France, ratified by the United States Aug. 11, 1853 (10 U. S. Statutes at large, p. 997). That article provides that "the local authorities * * * shall "lend forcible aid to the consuls, when they may ask it, "to arrest and imprison all persons composing the crew, "whom they may deem it necessary to confine". The important words, so far as this brief is concerned, are "*the local authorities*". These may be construed in either of two ways (1) local authorities, *federal and state;* (2) local *federal* authorities. We will show that the im-

prisonment of Moisan is not justified under either construction of this article of the treaty.

Under the first construction, which would include state authorities, we will show that:

I. A federal treaty cannot impose on a state officer, *qua* state officer, a function which violates the constitution of the state which he represents in his official character;

II. A federal treaty cannot compel a state to enforce the penal laws of a foreign country by extradition or otherwise.

Under the second construction, which confines the term "local authorities" to local federal officials we will show that:

III. Congress has construed the treaty to apply only to federal authorities and has enacted legislation to provide for such cases; and a consul general must comply with the provisions of sections 4079 and 4080, Revised Statutes, before he can cause the arrest of a sailor under the treaty.

I.

A FEDERAL TREATY CANNOT IMPOSE ON A STATE OFFICER QUA STATE OFFICER, A FUNCTION VIOLATING THE CONSTITUTION OF THE STATE WHICH HE REPRESENTS IN HIS OFFICIAL CHARACTER.

As before suggested, the imprisonment by the chief of police was not to compel Moisan to perform any contractual obligation to his ship. As a matter of fact the chief made it impossible to perform any contract he may have had with her. Indeed, the "Jacques" left port while he was confined in the city prison. The only reasonable construction of the chief's return to the writ is that Moisan was being held either to be returned to France to be tried upon some criminal charge, or as a punishment for the alleged insubordination. This is certainly the construction of the return most favorable to the appellant. If the chief of police cannot justify the arrest on the ground that the prisoner was held to be charged with or as a punishment for some French *criminal* offense *a fortiori* will he fail to justify on the ground that he is attempting to lend the state government to procure the satisfaction of some *contractual* obligation, to be litigated in France, by a seizure of the body of one of the contracting parties either in the nature of attachment or a *capias.*

The constitution of California has the usual provision providing that no "*person*" shall be deprived of his liberty without due process of law.

Constitution of Cal., Article I, Sec. 13.

Due process of law, where one is to be deprived of his liberty on a criminal charge, requires prosecution either by indictment or information and allowance of trial by jury.

Constitution of Cal., Article I, Secs. 7 and 8.

The constitution also abolishes civil arrests except for fraud or willful injury to person or property (Art. I, Sec. 15). The record here shows neither exception.

Neither information nor indictment had been filed against Moisan nor was he held pending the preferment of any charges leading to an information or indictment, or any prosecution under California law. It is patent, then, that the chief of police was holding Moisan in violation of the state constitution.

That Moisan is a "person" within the meaning of the above provisions of the state constitution seems to need no argument. However, the question is set at rest by Section 1977 of the Revised Statutes, enacted subsequently to the treaty in question, which provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and *to no other.*"

The above section was held to apply to a Chinese alien temporarily in the United States under the treaty of Nov. 17, 1880 (22 Stats. 827).

Yick Wo v. Hopkins, 118 U. S. 356.

The record thus fairly presents the question, "May a "treaty under the federal constitution impose on a state "officer *qua* state officer, a function which compels him "to violate the constitution of the state he represents in "his official capacity?"

It may be well at this time to limit the discussion by pointing out that we do not deny the full power of the *federal* government to remove aliens at will. Nor do we deny the power of its treaties to impose such restrictions and conditions upon aliens as it may deem wise. Nor do we contend that the fourteenth amendment in any way invalidates Article VIII of the treaty as applying to an alien sailor, though, as we have pointed out, the record does not show Moisan to have been an alien, and as far as the record shows he may very well have been an American sailor employed at some American port, perhaps at San Francisco, for the return voyage to France. Further, we admit that within its sphere a treaty is paramount to the constitution and laws of a state.

We do not deny that the federal government has the power to treat an alien as Moisan has been treated, but we do deny that it can, either by treaty or congressional legislation, authorize a state officer, acting in his official capacity, to assist it in such a proceeding. We contend that while a treaty may control the action of a federal officer, or of a citizen of the United States, it has no power to modify the framework of any state government by compelling state officers to do a thing forbidden by their constitution.

The principle we invoke for the freedom of state officials

from federal interference with the performance of their functions has many times been upheld by this Court, in cases involving attempts to raise federal revenue by taxing the salaries of state officers. It has been often said that "the power to tax is the power to destroy". If the congressional power to tax state salaries be upheld in any degree, the exercise of that power to the extent of taking fifty or seventy-five per cent of the official's income might be deemed a necessary measure for a great national emergency, and the state left practically without a government. Yet if the relatively indirect interference by taxation of state salaries is held beyond the nation's power, *a fortiori* is the sapping of energy and theft of time of a state official by directly imposing on him functions not authorized by the government he serves. And more vicious still the confusion introduced into the machinery of state government by giving functions to state officers of which the state constitution forbids the exercise.

In holding that Congress could not impose a tax on the salary of a judicial officer of the state, Mr. Justice Nelson said:

> "The constitution guarantees to the states a republican form of government and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system * * * it would seem to follow as a reasonable if not a necessary consequence that the means and instrumentalities employed for carrying on the operation of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them by the constitution should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing

> power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax."
>
> The Collector v. Day, 11 Wall. 113.

In an attempt by a state to tax the salary of a federal officer the converse was held to be true.

> Dobbins v. The Commissioners, 16 Peters 435.

Any "instrumentality employed for carrying on the " operation of their government" is beyond the reach of federal interference. Congress attempted to tax the municipal bonds of the city of Baltimore given to aid a railway which was to bring increased business to the city. This court held the tax invalid as interfering with the machinery of state government, saying:

> "A municipal corporation like the city of Baltimore is a representative not only of a state but is a portion of its governmental power. It is one of the creatures made for a specific purpose, to exercise within a limited sphere the powers of the state.
>
> United States v. Ry. Co., 17 Wallace 329.

The same holding was had where the congressional tax was laid upon the income from municipal bonds.

> Pollock v. Farmers Loan and Trust Co., 157 U. S. 583.

Even the extreme case of Veazie Bank v. Fenno, where the congressional power to regulate the currency was held paramount to the state control of its banks and where the tax on state banks destroyed their power to circulate

bank notes, places the limit of federal power far inside the boundaries we contend for it. The court there says:

> "It may be admitted that the reserved rights of the states, such as the right to pass laws, *to give effect to laws through executive action* to employ necessary agencies for legitimate purposes of state government, are not proper subjects for the taxing power of congress.
>
> Veazie Bank v. Fenno, 8 Wall. 547.

The same principle of the inviolability of the machinery of a state from federal interference has been laid down where national stamp duties were attempted to be imposed upon the process of state courts.

> Warren v. Paul, 22 Ind. 279;
> Jones v. Estate of Kesp, 19 Wis. 390;
> Fifield v. Close, 15 Mich. 505;
> Smith v. Short, 40 Ala. 385.

This court has twice construed attempts of congress to impose functions on state officers, once in the apprehension of fugitive slaves and the other the apprehension of fugitive sailors. In neither case was the point raised that if congress has the power to impose *any* function on a state official without the state's permission, it may impose enough to destroy his power to execute his state duties, and the court apparently did not consider the rule laid down in the cases holding that even the more remote interference of taxation of salaries was beyond the power of congress. In the latter case the "convenience" of the use of the state officer seemed to be a controlling consideration.

Both the cases, however, recognize the doctrine that the state official cannot be granted a function, the exercise of which is forbidden by the laws of his state.

In the first case, involving the question of apprehending fugitive slaves, the court, through Mr. Justice Story, says:

> "As to the authority so conferred on state magistrates, while a difference of opinion has existed, and may exist still on the point, in different states, none is entertained by this court, that state magistrates may, if they choose exercise that authority, *unless prohibited by state legislation.*"
>
> Prigg v. Commonwealth of Pennsylvania, 16 Peters 539 at 622.

In the second case, involving the same power with regard to fugitive sailors, the language of Judge Story above quoted is repeated with approval.

> Robertson v. Baldwin, 165 U. S. 275.

That a federal treaty is of no higher sanction than federal legislation is well established.

> Chae Chan Ping's case, 130 U. S. 600;
>
> Tong Yue Ting v. United States, 149 U. S. 698, and cases cited.

In conclusion we submit that whatever power a federal officer may properly receive to make such an "executive arrest" as Moisan was subjected to, no state officer can, under his state constitution, lend his assistance to such a proceeding.

It may be well to point out that the above question has a practical as well as an academic reason for its solution. There are no federal prisons in California and ultimately the custody of these sailors must come to state officials. We are not daunted by this horn of the dilemma, and say boldly that the treaty provision far better should be rendered of no present avail, and that the United States should provide its own prisons, than that Congress should be held to be authorized to lay violent hands on the machinery of state government, and to give warrant to state officials to violate one of its constitutional guarantees.

II.

A FEDERAL TREATY CANNOT COMPEL A STATE TO ENFORCE THE PENAL LAWS OF A FOREIGN COUNTRY BY ASSISTING IN EXTRADITION OR OTHERWISE.

In our first section we have pointed out that Moisan is being imprisoned in a proceeding criminal in its nature. Opposing counsel informs me that Moisan's insubordination violates a law of the French navy and that he is to be charged and tried on his return. It is perfectly plain from the record that the process attempted is in the nature of an extradition of an alleged offender against French law.

We submit that the state cannot lend its assistance to this. The general rule that a state cannot enforce the criminal laws of a foreign government finds no exception in the state or federal constitution. Chief Justice Marshall has tersely expressed the rule in The Antelope, 10 Wheaton 66, at 123, and it has been repeatedly recognized in the decisions.

Huntington v. Attrill, 146 U. S. 657.

Extradition, as a part of the criminal procedure of a foreign nation, is no exception to the general rule. This court has said:

> "Under the constitution, the executive of a state has no power to surrender a person charged with murder to the authorities of a foreign government for trial."

Holmes v. Jennison, 14 Peters 540;

Ex parte Holmes, 12 Vt. 631.

State laws providing for the surrender of fugitives from foreign governments are held unconstitutional.

People v. Curtis, 50 N. Y. 321.

For this second reason we submit the decision of the district court should be sustained and the prisoner freed.

III.

CONGRESS HAS CONSTRUED THE TREATY TO APPLY TO FEDERAL AUTHORITIES ONLY AND HAS ENACTED LEGISLATION TO CARRY THE TREATY INTO EFFECT WITH WHICH THE APPELLANT HAS NOT COMPLIED.

In our previous sections we have shown that the term local "authorities" cannot be construed to apply to local *state* authorities, and that the decision of that question must necessarily be rendered as the treaty can be made effective only in the event that the wardens of state prisons can hold aliens in such executive arrests.

We will now show that in this particular case congress has so legislated that the state official, if he is ever to receive the custody of the prisoner, can do so only after a hearing before a federal judge or commissioner.

Under the congressional procedure the consul must make application to "any court of record of the United " States, or to any judge thereof", or "any commissioner " of a circuit court, setting forth that such a difficulty, " controversy, or disorder has arisen, briefly stating the " nature thereof" and that the sailor "has withdrawn, or " is believed to be about to withdraw", or "has refused, " or is about to refuse to obey the lawful jurisdiction of " such consular or commercial authority" and "stating " that such a person is not a citizen of the United States". Further, it provides for the issuance of "a warrant of

" arrest issued to the marshal or a *citizen of the United* " *States, specifically deputed for that purpose*".

U. S. Statutes at large, Secs. 4079, 4080.

As an opinion of the legislature on the constitutionality of a treaty giving to state officers the function appellant claims for the chief of police this statute is significant. The convenience of using the state judicial officers at those smaller ports where no federal officers reside must have been patent to congress, yet it has with great particularity confined the enforcement of the treaty provisions to federal officers or citizens of the United States.

The act, however, is more than an academic construction of the treaty. As a subsequent enactment it limits the term local authorities to the enumerated persons, and creates proceedings prerequisite to the arrest.

The record shows that the proceeding failed to comply with the above statutes in the following respects: 1. It does not appear that Moisan is not a citizen of the United States. 2. It does not appear tnat any application was made to a United States court. judge or commissioner or to any court, state or federal. 3. It does not appear that Moisan refused to submit himself to the consular authority, or that he was about to do so, or that the consul believed he was about to do so. 4. It does not appear that any warrant was issued to any one for Moisan's arrest. 5. It does not appear that the arresting officer was a citizen of the United States.

In concluding, we respectfully pray that the court give its decision on the first two constitutional questions raised by our brief, as questions that must be determined by this court before the treaty provision can be said to be finally construed. As no discussion of these points was had in the opening brief of appellant we further pray that we may be allowed to file a reply to any brief filed which controverts the position here taken.

Respectfully submitted,

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